IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 19, 2007

VAN IRION, ET AL. v. LEWIS GOSS, ET AL.

Appeal from the Circuit Court for Hamilton County
No. 06C720 Samuel Payne, Judge

No. E2006-02421-COA-R3-CV - FILED JULY 31, 2007

This case was originally commenced in the Knox County General Sessions Court. Van Irion and his wife, Dawn Irion, filed a civil warrant there against Lewis Goss, Jonathan Newson (Goss and Newson will be collectively referred to as "the defendants"), and eBay, Inc.[1] The warrant alleges, in general terms, fraud, breach of contract, breach of warranty, and violation of the Tennessee Consumer Protection Act ("the TCPA"). The plaintiffs' action arises out of their purchase of a boat from the defendants through the internet auction site eBay. The suit against the defendants was transferred by the Knox County Circuit Court[2] to the trial court. On October 2, 2006 – following a hearing on August 22, 2006 – the trial court entered an "Amended Final Order" awarding the plaintiffs a judgment against the defendants for $4,410, but failing to award attorney's fees. Plaintiffs appeal the failure of the court to award fees. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY, and SHARON G. LEE, JJ., joined.

Van Irion, Knoxville, Tennessee, for the appellants, Van Irion and Dawn Irion.

Lewis Goss, appellee, pro se.

No appearance on behalf of Jonathan Newson.

---

[1] The defendant eBay, Inc., was misidentified in the civil warrant as "E-Bay Corporation." The claim against eBay, Inc., is not before us on this appeal.

[2] The plaintiffs' civil warrant was dismissed in the Knox County General Sessions Court. That dismissal was appealed to the Knox County Circuit Court.

OPINION

I.

The plaintiffs' core complaint is that the trial court, after orally implying that its judgment would include attorney's fees, failed to award any fees in its Amended Final Order. The transcript of the bench trial includes the following comments of the trial court:

> Okay. The verdict in favor of the plaintiff for $4,410.00. $3,100 for the cost of the boat, $820 for storage, plus the court cost of $490 for expenses, plus attorney's fees. You'll have to submit an affidavit for attorney fees.

The first order entered after the hearing on August 22, 2006, was an order entered September 22, 2006. It recites "[t]hat judgment be entered in favor of the plaintiffs for damages." Following this statement in the first order is a breakdown of the award. As set forth in the court's order, the breakdown is as follows:

a. Unreimbursed amount of boat purchased	$3,100
b. Boat Storage fees	820
c. Costs	[no entry]
d. Attorney fees	4,310
Total damages awarded to plaintiff[s]	$4,230

The top two of these four numbers are typewritten. The last two, *i.e.*, $4,310 and $4,230, are in longhand. As can be seen, the three figures above the line total substantially more than $4,230.

The last document in the record before the plaintiffs' notice of appeal is the trial court's Amended Final Order entered October 2, 2006. This last order is essentially identical to the court's order of September 22, 2006, except as to the portion dealing with the breakdown of the plaintiffs' damages. The October 2, 2006, order, again in the format of the order, breaks down the damages as follows:

a. Unreimbursed amount of boat purchased	$3,100
b. Boat Storage fees	820
c. Expenses	490
d. Attorney fees	"0" s/SHP
Total damages awarded to plaintiffs	$4,410

(Quotation marks in original). The notation "'0' s/SHP" is in longhand. The initials "SHP" are those of the trial judge, Samuel H. Payne, who signed both the September 22, 2006, order and the October 2, 2006, order. Judge Payne retired in the fall of 2006. He was replaced effective September 1, 2006, by Judge W. Jeffrey Hollingsworth.

II.

In an appeal from a bench trial, our standard of review is *de novo* upon the record of the proceedings below; however, the record comes to us with a presumption of correctness as to the trial court's factual determinations, a presumption we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995). Our review of questions of law is *de novo* with no such presumption of correctness attaching to the trial court's conclusions of law. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996).

The authority of a court to award attorney's fees is limited. Such an award must be based upon the authorization for an award of fees in a contract or statute. ***Taylor v. Fezell***, 158 S.W.3d 352, 359 (Tenn. 2005). The TCPA is such a statute. It expressly authorizes a trial court, in the exercise of its discretion, to award counsel fees. T.C.A. § 47-18-109(e)(1) (2001). A trial court's discretionary ruling, such as one awarding fees under the TCPA, "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting ***State v. Scott***, 33 S.W.3d 746, 752 (Tenn. 2000) & ***State v. Gilliland***, 22 S.W.3d 266, 273 (Tenn. 2000)). That discretion is abused when the court "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." ***State v. Shirley***, 6 S.W.3d 243, 247 (Tenn. 1999) (citation omitted). In a case involving a trial court's discretion, we are cautioned not to substitute our judgment for that of the trial court. ***Myint v. Allstate Ins. Co.***, 970 S.W.2d 920, 927 (Tenn. 1998).

III.

A.

On appeal, the plaintiffs challenge the trial court's failure to award attorney's fees. They ask us to award them $4,310, the amount ostensibly awarded by the trial court in its September 22, 2006, order. The plaintiffs argue that the trial court erred when it violated Tenn. R. Civ. P. 59.05[3] by failing to specify why, in its order of October 2, 2006, it deleted the attorney's fee awarded in its September 22, 2006, order. They maintain they are entitled to attorney's fees because, according to them, they established a violation of the TCPA, which, as they point out, is to be liberally construed. *See* T.C.A. § 47-18-102(2) (2001).

---

[3] Tenn. R. Civ. P. 59.05 provides as follows:

> Within 30 days after entry of judgment the court on its own initiative may alter or amend the judgment, or the court may order a new trial for any reason for which it might have granted a new trial on motion of a party where no such motion has been filed. After giving the parties notice and opportunity to be heard, the court may grant a motion for a new trial, timely filed and served, for reasons not stated in the motion. In either case, the court shall specify in its order the grounds for its action.

B.

In this case, we are faced with Judge Payne's oral statement from the bench on August 22, 2006, advising the plaintiffs that they would "have to submit an affidavit for attorney fees." They argue, convincingly, that this shows that Judge Payne was inclined to award fees.

As we have previously noted, following Judge Payne's oral ruling on August 22, 2006, he entered two orders. The first order, dated September 22, 2006, purports to award the plaintiffs $4,310 in attorney's fees and, assuming such an award was intended, reflects a clear miscalculation as to the total damages. The Amended Final Order, dated October 2, 2006, awards the plaintiffs "0" attorney's fees and conforms with the $4,410 damage figure expressly stated by the trial court at the conclusion of the proof. Neither of the trial court's orders states the basis of liability for the damage award of $4,410. As will be recalled, the plaintiffs had alleged multiple bases for relief in their civil warrant.

C.

A trial court speaks through its minutes:

> A Court speaks only through its written judgments, duly entered upon its minutes. Therefore, no oral pronouncement is of any effect unless and until made a part of a written judgment duly entered.

Sparkle Laundry & Cleaners, Inc. v. Kelton, 595 S.W.2d 88, 93 (Tenn. Ct. App. 1979) (citations omitted). Thus, as between the trial court's oral pronouncement of August 22, 2006 — clearly indicating the court's willingness to consider an award of fees — and the October 2, 2006, order not awarding fees, the latter prevails. It remains to be seen if the last order was (1) invalidly entered or (2) not supported by a preponderance of the evidence.

D.

The plaintiffs challenge the validity of the trial court's last order of October 2, 2006. They point to the fact that this order fails to state the reason or reasons why the court amended its prior order of September 22, 2006. The plaintiffs rely upon the language of Tenn. R. Civ. P. 59.05 requiring the court, in amending a prior judgment, to "specify in its order the grounds for its action." We conclude that the record before us does not justify the invalidation of the trial court's order of October 2, 2006.

The plaintiffs filed their notice of appeal on October 30, 2006. That notice is directed at the trial court's order of October 2, 2006. This clearly shows that the plaintiffs were aware of that order within 30 days of its entry. This is consistent with the certificate of the trial court clerk affixed to the order reflecting that, on October 2, 2006, a copy was sent to all parties. In their brief, the plaintiffs state that they filed a motion pursuant to Tenn. R. Civ. P. 60 pointing out the inconsistency between

the order of September 22, 2006, and the October 2, 2006, order. They do not state in their brief when this motion was filed. They assert that Judge Hollingsworth denied their motion. *Neither the motion nor an order denying it is in the record certified to us by the trial court clerk.* An assertion in a brief regarding the filing of a pleading and the trial court's action on it cannot be considered by us as proven in the absence of these documents from the record. ***Price v. Mercury Supply Co., Inc.***, 682 S.W.2d 924, 929 n.5 (Tenn. Ct. App. 1984). As the record now stands, it is clear that the plaintiffs were aware, within 30 days of the entry of the October 2, 2006, order, that the trial court had amended its previous order to delete the ostensible award of counsel fees of $4,310. We are not required to grant relief "to a party . . . who failed to take whatever action was reasonably available to . . . nullify the harmful effect of an error." Tenn. R. App. P. 36(a). Based upon the record before us, the plaintiffs knew of the trial court's "error" but failed to call it to the court's attention. Accordingly, we decline to award the plaintiffs relief based upon the alleged failure of the trial court to comply with Tenn. R. Civ. P. 59.05.

E.

The plaintiffs claim that, in any event, the trial court erred in failing to award attorney's fees. The record does not substantiate the plaintiffs' position.

The only possible legal basis for an award of fees in this case is the TCPA; the plaintiffs do not argue to the contrary. T.C.A. § 47-18-109(e)(1), a part of the TCPA, provides that "[u]pon a finding by the court that a provision of this part has been violated, the court *may* award to the person bringing such action reasonable attorney's fees and costs." (Emphasis added). As pointed out, the record in the instant case does not reflect the basis of liability upon which the trial court predicated its $4,410 damage award. The plaintiffs alleged four bases for their action, only one of which — the TCPA — would justify an award of fees. We cannot speculate that the court found a violation of the TCPA rather than liability based upon one of the other bases alleged in the plaintiffs' civil warrant. Moreover, even if we could say that the trial court awarded damages based upon a TCPA violation, there is nothing in the record reflecting that the court abused its discretion in failing to award any fees. As was the case with the alleged violation of Tenn. R. Civ. P. 59.05, the plaintiffs in their brief refer to facts, *i.e.*, their hourly rate and time expended by them on this case, that are not documented in the record. They also refer in their brief to Mr. Irion's affidavit[4] supporting their fee request. The affidavit is not in the record. As previously noted, assertions in a brief cannot substitute for documentation in the record. ***Price***, 682 S.W.2d at 929 n.5.

We find no abuse of discretion.

[4]Mr. Irion is an attorney.

IV.

The judgment of the trial court is affirmed. This case is remanded to the trial court for enforcement of the judgment and for the collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellants, Van Irion and Dawn Irion.

_____

CHARLES D. SUSANO, JR., JUDGE